FILED
AUG 5 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-2034

DONALD WILSON,
PETITIONER

vs.

STATE OF ALABAMA,
RESPONDENT

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

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INDEX

Subject Index

		Page
I.	OPINIONS OF THE COURT BELOW	1
II.	JURISDICTION	2
III.	QUESTION PRESENTED	2
IV.	CONSTITUTIONAL PROVISION INVOLVED	2
V.	STATEMENT	2
VI.	SUMMARY OF ARGUMENT	3
VII.	ARGUMENT	3
VIII.	CONCLUSION	7
IX.	CERTIFICATE	8

TABLE OF CASES CITED

Page

Armstrong v. *State*,
290 Ala. 256, 275 So.2d 702 (1973) 4

Chesapeake & Ohio Railway Company v. *MacDonald*,
214 U.S. 191, 53 L.Ed. 963 ..... 3, 4

Cunningham v. *Alabama*,
270 Ala. 731, 121 So.2d 890, cert. denied 364 U.S.
913, 81 S.Ct. 277, 57 L.Ed.2d 227 ..... 3, 4

Duncan v. *State*,
275 Ala. 290, 154 So.2d 305 (1963) 4

Hammerstein v. *Superior Court*,
341 U.S. 491, 492, 95 L.Ed. 1135 ..... 3, 4

Newman v. *Gates*,
204 U.S. 89, 51 L.Ed. 385 ..... 3, 4

Taylor v. *State*,
18 Ala. App. 466, 93 So. 78 5

Wilson v. *State*,
1st Division 312, S.C. 772 1

STATUTES CITED

	Page
Rule 39, Revised Rules of the Supreme Court, Alabama Code 1940, Title 7, Appendix	3, 7
United States Code:	
Title 28, Section 1257(3)	2
Rule 19, United States Supreme Court Rules	2

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BRIEF AND ARGUMENT FOR RESPONDENT

I

OPINION OF THE COURT BELOW

The opinion of the Court of Criminal Appeals of Alabama is not yet reported:

Donald Wilson v. State, 1st Division 312, Court of Criminal Appeals opinion dated February 12, 1974, rehearing denied March 19, 1974 and application for writ of certiorari

II

JURISDICTION

The petitioner has applied for a writ of certiorari from the Supreme Court of the United States to review the judgment of the Court of Criminal Appeals of Alabama, rendered on February 12, 1974. Application to the Court of Criminal Appeals of Alabama was denied on March 19, 1974. A petition to the Supreme Court of Alabama for writ of certiorari was denied on May 16, 1974. Petitioner applies under the provisions of Title 28, Section 1257(3), United States Code and Rule 19, United States Supreme Court Rules.

III

QUESTION PRESENTED

Whether the order of the appellate court dismissing an appeal will support the Supreme Court's jurisdiction when the order is based upon failure to conform to state rules of practice in perfecting the appeal.

IV

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States.

V

STATEMENT

Petitioner, a white man, was tried on an indictment

charging him with murder in the first degree, found guilty of murder in the second degree and sentenced to ten years imprisonment. He gave notice of appeal and filed a motion for new trial, the latter being denied after a hearing thereon. The Court of Criminal Appeals of Alabama affirmed the case on February 12, 1974, and denied application for rehearing on March 19, 1974. Petition for writ of certiorari, filed in the Supreme Court of Alabama, was denied on May 16, 1974.

VI

SUMMARY OF ARGUMENT

Where the order dismissing the appeal is based upon the failure to conform to State rules of practice in perfecting the appeal, neither the order nor the lower court judgment will support the Supreme Court's jurisdiction. *Newman v. Gates*, 204 U.S. 89, 51 L.Ed. 385, *Chesapeake & Ohio Railway Company v. MacDonald*, 214 U.S. 191, 53 L.Ed. 963; *Hammerstein v. Superior Court*, 341 U.S. 491, 492, 95 L.Ed. 1135; *Cunningham v. Alabama*, 270 Ala. 731, 121 So.2d 890, cert. denied 364 U.S. 913, 81 S.Ct. 277, 57 L.Ed.2d 227.

VII

ARGUMENT

Petitioner seeks to argue again denial of his motion for new trial. After case was affirmed and rehearing denied in the Court of Criminal Appeals of Alabama, he filed petition for writ of certiorari in the Supreme Court of Alabama. Certiorari was denied by that Court on May 16, 1974 because petition failed to comply with the mandate of Rule 39, Re-

vised Rules of Practice in the Supreme Court that he had duly filed an Application for Rehearing in the Alabama Court of Criminal Appeals in this case, within the time required by law, raising the points hereinafter set forth in his application for writ of certiorari and that said application had been denied within the fifteen days prior to filing for certiorari. (See page 4 of petitioner's petition, first sentence).

Alabama appellate courts have held that compliance with Rule 39, supra, is jurisdictional. *Armstrong v. State*, 290 Ala. 256, 275 So.2d 702 (1973); *Duncan v. State*, 275 Ala. 290, 154 So.2d 305 (1963); Vol. 7, Alabama Digest, Criminal Law, Key No. 1071.

In the past this Honorable Court has held that if the order dismissing the appeal is based upon the failure to conform to state rules of practice in perfecting the appeal, neither the order nor the lower court judgment will support the Supreme Court's jurisdiction. *Newman v. Gates*, 204 U.S. 89, 51 L.Ed. 385; *Chesapeake & Ohio Railway Company v. MacDonald*, 214 U.S. 191, 53 L.Ed. 963; *Hammerstein v. Superior Court*, 341 U.S. 491, 492, 95 L.Ed 1135.

The latter case was one in which a federal question was attempted to be presented, and this Honorable Court, in denying certiorari in that case, held that an appeal from an order refusing to move the case to the United States Circuit Court for the Eastern District of Kentucky had to be taken within two years as provided for by the Kentucky Civil Code of Practice.

This Honorable Court denied certiorari in *Cunningham v. Alabama*, 270 Ala. 731, 121 So.2d 890, 364, U.S. 918, 81

S.Ct. 277, 57 L.Ed.2d 277 in a case wherein petitioner failed to conform to Rule 39, supra.

But if this Honorable Court wishes to look at the contentions of petitioner, respondent submits there is no merit therein as there was no harmful error shown. In fact, vague inferences of error were refuted by the testimony at the motion for new trial. Petitioner's contention was that Deputy Sheriff Webb sold some of the jurors at supper during the progress of the trial that petitioner's father had killed a black man.

Petitioner specifically directs the attention of the Court to a portion of the new trial testimony of juror Nettie Dotson at transcript page 227 wherein the trial court sustained the District Attorney's objection to a question calling for rank hearsay. Clearly this ruling cannot be erroneous.

The general rule obtaining in Alabama is that jurors may not give evidence to impeach their verdict.

In *Taylor v. State*, 18 Ala. App. 466, 93 So. 78, the case of principal reliance of the petitioner, an exception is established to this general rule. Nevertheless, the *Taylor* case, supra, is crucially dissimilar for the reason that there the defendant made an affirmative showing to the trial court that the testimony of the jurors would be that the sheriff had made statements of a prejudicial nature to the jurors during their deliberations.

In the case at bar it was patently incumbent upon the petitioner to make an affirmative showing to the trial court that the offered juror — witness's testimony would substantiate the claim of prejudicial statements by Deputy

Webb. The petitioner utterly failed to carry this burden in the form of a showing by proposed testimony of the existence of the extraneous influence he now asserts did in fact exist. This failure was fatal.

Not only was there no showing made but also no witness during the entirety of the new trial hearing ever even indicated that he would give testimony that the alleged statement of Deputy Webb was ever made.

In fact, Nettie Dotson specifically denied hearing Deputy Webb say that the Appellant's father had killed a black man (Tr.p. 228). The sustaining of the objection was cured by her answer.

Witness Charley Tate testified that he did not remember if Deputy Webb was even at the supper table on the night in question (Tr. p. 237).

Witness William Webb denied in his testimony that the killing of the black man was ever discussed (Tr. pp. 250-251).

Witness Fern Pace denied in her testimony that Deputy Webb told the story about the Appellant's father (Tr. p. 269).

Witness Leo Marshall denied in his testimony that the story about the Appellant's father was told (Tr. p. 280).

Witness John Witherspoon testified "No sir, ain't nobody brought that up," in reference to the story about the Appellant's father (Tr. p. 293).

As stated above, none of the other witnesses gave any indication whatsoever that their testimony would be to the effect that Deputy Webb had made such a statement.

It is undeniable, in view of the posture of the evidence presented to the trial court, that the Court cannot be placed in error for having overruled the petitioner's motion for new trial. The petitioner's argument supportive of the motion is unfounded supposition predicated on speculation that has no basis in the record.

VIII

CONCLUSION

For the foregoing reasons, respondent submits that the order of the Supreme Court of Alabama denying petition for writ of certiorari upon its own motion because of failure to conform to Rule 39 of Revised Rules of Practice in the Supreme Court is an order which will not support the jurisdiction of this Honorable Court. No grounds are shown for granting the relief sought and the writ of certiorari should be denied.

Respectfully submitted,

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IX

CERTIFICATE OF SERVICE

I, David W. Clark, one of the attorneys for respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 1st day of August, 1974, I served a copy of the foregoing brief and argument upon the attorney for petitioner, by mailing a copy in a duly addressed envelope to said attorney of record as follows:

To: Honorable John L. Lawler
903 Commercial Guaranty Bank Building
Mobile, Alabama 36601

David W. Clark

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